ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
BEEHIVE TELEPHONE COMPANY, INC. BEEHIVE TELEPHONE, INC. NEVADA	)	CC Docket No. 97-249
Tariff F.C.C. No. 1	)	Transmittal No. 8

To: Chief, Common Carrier Bureau

REBUTTALS

Beehive Telephone Company, Inc. ("Beehive Utah") and Beehive Telephone, Inc. Nevada (collectively "Beehive"), by their attorneys, hereby submit their response to the Opposition to Direct Case of Beehive Telephone Company ("Opposition") filed by AT&T Corp. ("AT&T") in the above-captioned proceeding.

Beehive's 1994-98 Rates

AT&T's Opposition is littered with accusations and conjecture, but it is barren of proof. Many of AT&T's allegations are transparently baseless. Witness its charge that Beehive has attempted to recover expenses associated with Joy Enterprises, Inc. ("JEI") "since 1994 through rates which the Commission has found were set based upon unlawful rate of return of percentages." Opposition at 5-6.

First of all, Beehive's 1994 access rates were based on 1993 cost and demand data. There were no expenses associated with JEI in 1993 because Beehive did not enter into an arrangement with JEI until October 1994. In fact, Beehive filed its Interstate Access Tariff F.C.C. No. 1 on March 11, 1994, at least eight months before it incurred its first JEI expense.

Secondly, the Commission has never found that Beehive set its

access rates since 1994 upon "unlawful rate of return percentages". The Commission found that Beehive reported interstate rates of return for local switching of 12.2% in 1994, 111% in 1995, and 65% in 1996. *See Beehive Telephone Co., Inc.*, FCC 98-1 at 6 (Jan. 6, 1998) ("*Refund Order*"). The Commission's statement that Beehive "us[ed] an unauthorized rate of return" in calculating its 1997 access rates (Transmittal No. 6) was just unfortunate *dicta*. *Id.* The rates in all four of Beehive's access tariff filings were targeted at the prescribed 11.25% rate of return. And Beehive has documented that fact with respect to its Transmittal No. 6. 1/

The thought that Beehive used an unlawful rate of return ignores the "temporal dimension of rate-of-return regulation". *Virgin Islands Telephone Corp.* v. *FCC*, 989 F.2d 1231, 1239 (D.C. Cir. 1993). The fact that hindsight shows that Beehive earned excessive returns does not mean that it used an unlawful rate of return to set its rates. *See id.* The Commission recognizes that lawfully determined rates may not produce earnings at the authorized rates. *See MCI Telecommunications Corp.* v. *Southern Bell Telephone & Telegraph Co.*, 4 FCC Rcd 8135, 8136 (1989).

When it authorized small telephone companies to set future access rates on past costs and demand, the Commission anticipated that the process could produce "inaccurate" rates, but that it would be "self-correcting and thus rate neutral over time because current actuals would be used in subsequent periods to set rates". *Regula-*

1/ Reply to Opposition to Petition for Reconsideration at Ex. 1, *Beehive*, CC Docket No. 97-237 (Mar. 3, 1998).

tion of Small Telephone Companies, 2 FCC Rcd 3811, 3812 (1987). Clearly that process worked in the case of Beehive.

AT&T ignores the facts when it claims that the JEI arrangement "caused Beehive to increase its rates unreasonably". Opposition at 3. As shown below, the arrangement with JEI allowed Beehive to decrease its access rates.

Switched Access Service	1994 ($)	1995 ($)	1997 ($)	1998 ($)
Premium Local Transport Facility Per Access Minute Per Mile	0.00358	0.00127	0.00066	0.000533
Premium Local Transport Termination Per Access Minute	0.1470	0.04768	0.01815	0.00026992
Non-Premium Local Transport Facility Per Access Minute Per Mile	0.00161	0.00054	0.000299	0.000240
Non-Premium Local Transport Termination Per Access Minute	0.0662	0.02142	0.00817	0.012105
Premium Local Switching Per Access Minute	0.1540	0.03480	0.04012	0.028252
Non-Premium Local Switching Per Access Minute	0.0693	0.01566	0.01805	0.012714

As depicted below, Beehive's per minute access rates for one mile of transport have dropped 82% in just 3 1/2 years.

Effective Date	Premium ($)	Non-Premium ($)
July 1, 1994	0.30458	0.13711
July 1, 1995	0.08375	0.03762
August 6, 1997	0.05893	0.026519
January 1, 1998	0.055777	0.025059

The JEI Matter

AT&T notes that Beehive's arrangement with JEI is the subject

of a formal complaint that it brought in October 1996. *See* Opposition at 3, 6 n.9. That complaint proceeding is ongoing (final briefs are due to be filed on May 4, 1998). Moreover, the issues presented by AT&T have also been raised in at least five other pending proceedings, including three complaint proceedings [2/], an appeal of a declaratory ruling [3/], and a rulemaking. [4/] However, those issues were not designated for investigation in this case. *See Beehive Telephone Co., Inc.*, DA 98-502 (Mar. 13, 1998) ("*Designation Order*").

While the JEI arrangement is not a subject of this investigation (the *Designation Order* makes no mention of JEI), AT&T refers to it repeatedly. Beehive will rebut AT&T's contentions respecting JEI. But it will do so without conceding that the JEI arrangement is within the scope of this tariff investigation.

With respect to AT&T's musings about the possibility that Beehive may be an owner of JEI, *see* Opposition at 5, Beehive's prior management responded to an AT&T allegation in June 1995 by stating that it had obtained written confirmation from JEI that it had no

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2/ *See AT&T Corp.* v. *Frontier Communications of Mt. Pulaski, Inc.*, File No. E-96-36 (July 15, 1996); *Total Telecommunications Services, Inc.* v. *AT&T Corp.*, File No. E-97-03 (Oct. 18, 1996); *AT&T Corp.* v. *Jefferson Telephone Co.*, File No. E-97-07 (Dec. 23, 1996).

3/ *See Ronald J. Marlowe*, 10 FCC Rcd 10945 (Enf. Div.), *application for review noted*, 10 FCC Rcd 11518 (1995).

4/ *See Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, 11 FCC Rcd 14738 (1996).

affiliation with Beehive. 5/ That was true then, and it is true now. Neither Beehive nor Mr. Brothers has an ownership interest in JEI.

AT&T even stoops to find "sinister" JEI-related possibilities in some unidentified entries in the 1996 ledger for Beehive Utah. *See* Opposition at 5. AT&T apparently is referring to debits and credits of $548,618.75 to ledger account number 5082.A4. *See infra* Exhibit 1. The debits were disbursements or checks to JEI that were mistakenly entered into account 5082.A4, and then revised to bring the account back to zero. 6/ Thus, the entries evidence accounting errors, not some "accounting fiction" created to "mask" Beehive's ownership of JEI as AT&T wildly speculates. *See* Opposition at 5.

Contrary to AT&T's characterization, Beehive's arrangement with JEI is not a "revenue sharing agreement". Opposition at 3. A revenue sharing agreement is like AT&T's Cooperative Marketing Agreement with Malhotra & Associates ("Malhotra"), an audiotext services provider. *See International Audiotext Network* v. *AT&T Co.*, 893 F.Supp. 1207, 1210 (S.D.N.Y. 1994), *aff'd*, 62 F.3d 69 (2nd Cir. 1995). Under that agreement, Malhotra agreed to stimulate international traffic over AT&T's lines by advertising its audiotext services to

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5/ *See* Reply to AT&T Petition to Suspend and Investigate at 4-5 (June 16, 1995).

6/ The debits with the "D" in column "JI" in Exhibit 1 were for the disbursements to JEI that were posted to account 5082.A4 in error. The entries with a "G" in column "JI" were to reverse or correct the prior entries. *See infra* Exhibit 1.

international callers. *See id.*, 62 F.3d at 71. For every minute of in-bound international, sent-paid calling terminated over AT&T's facilities to Malhotra's audiotext service center in the United States, AT&T paid Malhotra a rate based on revenue derived from the settlement rate AT&T received from the foreign telephone administration in the country where the audiotext call originated. 7/

Unlike AT&T's payments to Malhotra, Beehive's monthly payments to JEI are not based on the minutes of use ("MOUs") or revenue generated by the traffic stimulated by JEI's operations. While Beehive initially paid JEI at a per minute rate, that rate was no more than the per minute rate that AT&T was paying at the time to a Utah adult chat line operator under a terminating switched access arrangement. *See* Supplemental Brief at 5-6.

Citing pages 5 to 7 of Beehive's Direct Case, AT&T claims that Beehive "admits" that its high total operating expenses to total plant in service ratio is "attributable to JEI". Opposition at 4. Beehive stated no such thing. It asserted that the increase in its expenses in 1995 was "attributable to [its] efforts to stimulate usage of its system and to its involvement in extraordinary litigation." Direct Case at 7. Beehive's efforts to stimulate usage were not confined to the JEI arrangement, and the vast bulk of Beehive's 1995 litigation expenses were unrelated to that arrangement. Beehive will address those matters next.

7/ *See* Supplemental Brief for Defendants in File No. E-97-04 and Initial Brief for Complainants in File No. E-97-14, Ex. 8 at 13-14 (Apr. 20, 1998) ("Supplemental Brief").

Legal Expenses

The 1995 Expenses

Turning to Beehive's legal expenses, AT&T claims that Beehive indicated that its increase in legal expenses from $309,224 in 1994 to $727,395 in 1995 was "directly related" to its efforts to increase MOUs. Opposition at 6. [8/] AT&T then states that the expenses "reflect" that it and other interexchange carriers ("IXCs") were forced to litigate the lawfulness of the JEI arrangement. *Id.*

AT&T simply misstates Beehive's case. Beehive only stated that the increase in legal expenses in 1995 were "related" to its efforts to increase its MOUs. Direct Case at 8. It went on to explain that those efforts included legal expenses incurred to market a new 800 service (the "SMS/800" or "Bellcore" litigation) in addition to the litigation with AT&T and *one* other IXC (MCI Telecommunications Corp. ("MCI")) over the JEI issue. *See id.* Beehive clearly stated that the SMS/800, AT&T and MCI litigation accounted for only $64,276 out of the $727,395 in legal fees it incurred in 1995. *See id.* And it clearly represented that "most" (76%) of its 1995 legal expenses were incurred in the "shareholder litigation" over the control of Beehive Utah. *Id.*

AT&T was not "forced" to litigate the lawfulness of the JEI arrangement. In fact, just after the litigation began in June 1995,

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8/ AT&T claims that the 1994 and 1995 legal expenses set out by Beehive in the text (page 8) of its direct case do not "match" the figures in Exhibit 5. *See* Opposition at 6 n.8. In fact, the text and Exhibit 5 are consistent. Both show that the total legal expenses were $309,224 in 1994 and $727,395 in 1995.

AT&T informed Beehive that it was "eager" to resolve five issues, including Beehive's access rates (which had been reduced from $.47 to $.14). 9/ AT&T stated that Beehive's rate reduction was "[u]nquestionably . . . a step in the right direction" and that AT&T's petition to suspend and investigate the new rate was simply to protect its interests which it felt was "prudent" in light of the JEI situation. 10/ However, once Mr. Brothers regained control of Beehive, AT&T refused to discuss a resolution of the dispute.

Consistent with the Commission's policy of encouraging carriers and customers to settle disputes over rates 11/, and in order to avoid legal expenses, Beehive made repeated attempts to settle the litigation with AT&T as it had with two other IXCs that raised the JEI issue. 12/ Those attempts have been rebuffed by AT&T. 13/

If AT&T had sat down to discuss a "comprehensive settlement" with Beehive in 1995, *see infra* Exhibit 2 at 4, some of Beehive's

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9/ *See infra* Exhibit 2 at 5 (Letter of A. L. Tyree to Kenneth Brothers (June 22, 1995)).

10/ *Id.*

11/ *See US Sprint Communications Co., L.P. v. AT&T Co.*, 9 FCC Rcd 4801, 4804 (1994), *aff'd, Sprint Communications Co., L.P. v. FCC*, 76 F.3d 1221 (D.C. Cir. 1996). *See also Brooten v. AT&T Co.*, 12 FCC Rcd 13343, 13351 (Com. Car. Bur. 1997).

12/ *See Sprint Communications Co., L.P.* v. *Beehive Telephone Co., Inc.*, 12 FCC Rcd 1383 (Enf. Div. 1997); *MCI Communications Corp. v. Beehive Telephone Co., Inc.*, 11 FCC Rcd 2523 (Enf. Div. 1996).

13/ For a discussion of Beehive's futile attempts to initiate settlement talks with AT&T, *see* Rebuttal to Opposition to Direct Case, *Beehive Telephone Co., Inc.*, CC Docket No. 97-237 (Dec. 29, 1997).

1995 and 1996 legal expenses could have been avoided. And perhaps Beehive could have escaped the $30,000 in legal expenses it incurred during the first month of this investigation.

The Legal Issues

Citing pages 14 to 16 of the Direct Case, AT&T states that Beehive argued that it "should not be required" to justify its legal expenses (other than the JEI-related expenses). Opposition at 6-7. Beehive never made that argument. Rather, Beehive addressed the legal standards that should be applied to its legal expenses.

AT&T does not dispute that the Commission adopted the presumption that "litigation costs . . . arise out of events occurring in the normal course of providing service to ratepayers, and that ratepayers benefit from provision of service." *Accounting for Judgments and Other Costs Associated with Litigation*, 12 FCC Rcd 5112, 5144 (1997) ("*Litigation Costs*"). AT&T seems to suggest that Beehive does not get the benefit of the presumption, and that it still must show that its litigation costs were reasonable and "benefitted ratepayers". *See* Opposition at 7. If Beehive understands the argument correctly, AT&T misunderstands the effect of the presumption.

As AT&T correctly points out, *see* Opposition at 7, the presumption of lawfulness that attaches to tariffed rates does not survive if the tariff is set for investigation, *see, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6822 (1990). However, Beehive is not claiming the presumption of lawfulness. Beehive is asserting a presumption of a proximate fact -- that its litigation costs benefitted ratepayers. Commission-

established presumptions of fact survive until rebutted by factual showings. *See Mountain States Telephone and Telegraph Co.* v. *FCC*, 939 F.2d 1012, 1030 (D.C. Cir. 1991) ("*Mountain States I*").

Under federal law, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof . . . which remains throughout . . . upon the party on whom it was originally cast." Fed. R. Evid. 301. *See Panduit Corp.* v. *All States Plastic Manufacturing Co., Inc.*, 744 F.2d 1564, 1579 (Fed. Cir. 1984). Thus, once Beehive established the basic facts giving rise to the presumption (that its litigation costs arose in the normal course of its business providing service to ratepayers), the effect of the presumption was to place the burden upon AT&T of establishing the nonexistence of the presumed fact (that the litigation costs benefitted ratepayers). *See* Fed. R. Evid. 201 (advisory committee notes); *Panduit*, 744 F.2d at 1579. While the burden of persuasion remains with it, Beehive may prevail on the strength of the presumption if AT&T failed to rebut it. *See Keeler Brass Co.* v. *Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988).

With respect to each piece of litigation, Beehive established the fact that the litigation arose from conduct undertaken by it in the normal course of business. *See* Direct Case at 17-31. Thus, Beehive established the "base" fact that gives rise to the presumption that the expense of the litigation benefitted its ratepayers. *See Panduit*, 744 F.2d at 1577. That placed on AT&T the burden of

making the factual showing that Beehive's expenses were incurred as a result of carrier conduct that could not "reasonably be expected to benefit ratepayers." *Mountain States Telephone and Telegraph Co.* v. *FCC*, 939 F.2d 1035, 1043 (D.C. Cir. 1991) ("*Mountain States II*"); *Litigation Costs*, 12 FCC Rcd at 1524 n.62. As Beehive will show, AT&T never carried that burden. As a result, the presumption of ratepayer benefit "retains its viability", *Panduit*, 764 F.2d at 1577, and Beehive may prevail on its strength, *see Keeler Brass*, 862 F.2d at 1066.

The "Shareholder" Litigation

Litigation expenses incurred in defending one's business are considered ordinary and necessary, *see Mountain States I*, 939 F.2d at 1031 (quoting *Commissioner* v. *Heininger*, 320 U.S. 467, 471-72 (1943)), even if such expenses are incurred "once in a lifetime", *A.E. Staley Manufacturing Co.* v. *Commissioner of Internal Revenue*, 119 F.3d 482, 487 (7th Cir. 1997) (quoting *Welch* v. *Helvering*, 290 U.S. 111, 114 (1933)). Such was the case with the expenses incurred by Beehive in the 1995 "shareholder" litigation.

AT&T did not dispute that the expenses of defending or settling shareholder litigation are legitimate expenses recoverable from ratepayers. *See* Direct Case at 29. Nor did it contest the fact that such expenses are considered ordinary and necessary. *See id.* Thus, At&T did not rebut the factual predicate for the presumption of ratepayer benefit.

AT&T tries to impugn Mr. Brothers' character as a means to show that the litigation expense Beehive incurred to "retain" him as its

president could not benefit its ratepayers. *See* Opposition at 8-9. AT&T has the facts wrong. The carrier conduct that gave rise to the 1995 shareholder litigation was the ouster of Mr. Brothers as president of Beehive Utah in April 1995. *See* Direct Case at 27. Thus, the litigation expenses were initially incurred by Beehive Utah when it was under the control of Mr. Brothers' sons. The purpose of the litigation was to enjoin Mr. Brothers from controlling any of Beehive's assets. *See id.* Therefore, AT&T is doomed by its allegation that Mr. Brothers was unfit to control Beehive because he lacked "candor and integrity". Opposition at 8. For if that allegation is true (which it is not), then the ratepayers stood to benefit from the legal expenses ($207,118) incurred to keep Mr. Brothers from regaining control of Beehive Utah. 14/

AT&T's attack on Mr. Brothers' character was entirely unjustified. Certainly that attack was not warranted by the fact that Beehive and Mr. Brothers were the subject of qualifications hearings (at which Mr. Brothers appeared *pro se*) twenty years ago. *See* Opposition at 8-9. 15/

14/ Mr. Brothers was terminated as president of Beehive on April 23, 1995. He was reinstated on August 31, 1995. During that period, Beehive Utah incurred legal fees with the law firms of Holme, Roberts & Owen ($201,789) and Roberts & Eckard ($2,904). Both firms represented Beehive Utah against Mr. Brothers. During this period, Beehive Utah incurred expenses in the shareholder litigation with Alexander's Print Shop ($798), CT Corporation ($447), Cecilee Wilson ($754) and Kinko's ($426).

15/ This is not the first time AT&T has dredged up Mr. Brothers' ancient history. *See* Opposition to Petition for Reconsideration at 9, *Beehive Telephone Co., Inc.* v. *AT&T Corp.*, File No. (continued...)

Mr. Brothers' pre-1978 conduct is too remote to be evidence that his reinstatement as president of Beehive in 1995 did not benefit ratepayers. Moreover, Commission consideration of that stale matter would violate the spirit, if not the letter, of the 1982 agreement under which the Common Carrier Bureau ("Bureau") agreed that the final decision in the qualifications hearings would not be *res judicata* if Beehive and Mr. Brothers successfully completed a two-year probationary period. *See infra* Exhibit 3 at 4-6. The Commission approved that agreement in 1986 without the probationary condition. *See Beehive Telephone Co., Inc.*, FCC 86-164 at 7 n.21, 8 (Apr. 14, 1986). It made the following findings:

> We are also aware that absent the substantial efforts of Beehive there would be no telephone service available to the residents of its operating area. Further, we have no cause to doubt that Beehive has entered the proposed Agreement with the Bureau as a first step toward a showing that it is at last prepared to perform in the manner we expect of a licensee. In the four years since entering the Agreement, the Bureau has brought to our attention no allegation of further misconduct by Beehive nor are we aware of any complaint concerning the activities of Beehive. 16/

Because the Commission effectively found that Mr. Brothers was "rehabilitated" twelve years ago, *see* Opposition at 8, Beehive is entitled to the presumption that its management has acted in good faith. *See Mountain States I*, 939 F.2d at 1034; *Policy to be*

15/ (...continued)
E-97-14 (Apr. 6, 1998); Reply Brief of AT&T Corp. at 18 n.28, *AT&T Corp.* v. *Beehive Telephone Co., Inc.*, File No. E-97-04 (July 2, 1997).

16/ *Beehive*, FCC 86-164 at 7.

Followed in the Allowance of Litigation Expenses of Common Carriers in Ratemaking Proceedings, 91 FCC 2d 140, 144 (1982) ("*Litigation Expenses*"). That presumption should extend to both factions of the 1995 shareholder litigation, and to their judgments as to the reasonableness of their outlays in the litigation. *See Mountain States I*, 939 F.2d at 1034.

AT&T objects generally to the $100,000 paid to Mr. Brothers as part of the settlement (which is under seal) of the 1995 shareholder litigation. *See* Opposition at 11. [17] Beehive Utah's management agreed to pay that sum to Mr. Brothers -- in his capacity as a shareholder litigant -- as a part of a settlement deemed necessary to save Beehive from destruction, and thereby ensure the continuation of service to its ratepayers.

The Hanksville Litigation

Beehive showed that its attempt to acquire the Hanksville exchange from US WEST was intended to increase its customer base by 20% and to expand its service to an area contiguous to its Caineville exchange. *See* Direct Case at 25. [18] Carriers routinely

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[17] AT&T questions whether any of the expenses associated with the shareholder litigation were "personal costs" incurred by Mr. Brothers to litigate his divorce. *See* Opposition at 9. None of those costs were assigned to Beehive. However, Beehive has discovered that a $25,000 payment to Mr. Brothers was erroneously allocated to the shareholder agreement. Beehive will amend its Direct Case to correct the error.

[18] Attached hereto as Exhibit 4 is a map which shows the proximity of Beehive's Caineville exchange to US WEST's Hanksville exchange. It also shows that the area surrounding the Hanksville exchange is either unserved or served by Beehive or Emery Telephone.

attempt to expand their service to reach new customers in the ordinary course of their businesses. AT&T does not dispute that fact. *See* Opposition at 9. Consequently, Beehive can assert the presumption of ratepayer benefit in support of its Hanksville litigation expenses.

AT&T makes the misguided argument that Beehive's attempt to acquire the Hanksville exchange in 1994 and 1995 "would not have benefitted IXC ratepayers, who would have been forced to pay Beehive's grossly inflated access rates during those years". Opposition at 9. At issue, however, is whether the expenses Beehive seeks to recover were incurred as a result of activity undertaken for the benefit of ratepayers. *See Mountain States II*, 939 F.2d at 1043, 1044; *Litigation Costs*, 12 FCC Rcd at 5124 n.62. Beehive undertook to acquire the Hanksville exchange in late 1992, *see Direct Case* at 24, well before it filed its own access tariff in March 1994 and "depooled from NECA", *see* Opposition at 9. 19/

The Commission must examine Beehive's litigation expenses from the vantage point of 1992, "because the reasonableness of the underlying conduct, not the defense of the conduct, determines whether the expense is reasonable." *Litigation Costs*, 12 FCC Rcd at 5120. Beehive could not be expected to predict when it undertook the Hanksville project in 1992 that it would lead to complex litigation ending in December 1996. Beehive's 1992 decision to try to acquire

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19/ AT&T's gratuitous charge that Beehive "depooled" from NECA in order to "fund the chat line" is baseless. *See* Opposition at 9. Beehive decided to file its own access tariff in 1993, long before its October 1994 arrangement with JEI.

the Hanksville exchange was a reasonable business judgment, and the fact that the effort was ultimately unsuccessful in 1996 is irrelevant. 20/ Beehive should be able to recover its litigation expenses, because the litigation was "unquestionably undertaken" for the benefit of the Hanksville acquisition, and thus for the benefit of ratepayers. *Mountain States II*, 939 F.2d at 1043 (quoting *Appalachian Electric Power* v. *FPC*, 218 F.2d 773, 777 (4th Cir. 1955)).

Finally, AT&T's contention that the IXCs would have had to pay Beehive's 1994 rate ($.47) or its 1995 rate ($.14) for access service to Hanksville is speculative. *See* Opposition at 9-10. 21/ Had Beehive succeeded in purchasing the Hanksville exchange for its true value, and had it acquired 100 to 125 new customers, Beehive would have been able to (1) increase the economic efficiency of its service in the area, and (2) spread its costs over a larger number of access lines. *See* Direct Case at 25. 22/ That would have allowed Beehive to develop access rates lower than those it

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20/ The Hanksville litigation did not end with an adverse judgment by the Public Service Commission of Utah ("UPSC"). In 1996, US WEST withdrew its petition for UPSC approval of the sale of the Hanksville exchange. *See* Direct Case at 25.

21/ Actually, only AT&T would have paid Beehive's $.47 and $.14 rates. The other IXCs would have paid Beehive's non-premium rates.

22/ AT&T's comparison of Beehive's access rates to U.S. WEST's 1994 and 1995 access rates is somewhat illogical. *See* Opposition at 10. AT&T is contending that Beehive should not have attempted to acquire the Hanksville exchange. However, if Beehive had not made that effort, U.S. WEST would have gone forward with its plan to sell the exchange to South Central Utah Telephone Cooperative Association ("SCUTA"). In that case, the IXCs would be paying SCUTA's access rates, not U.S. WEST'S rates.

eventually charged in 1994 and 1995.

The Ball Breach of Contract Case

Contrary to AT&T's contentions, *see* Opposition at 10, Beehive's explanation of the breach of contract suit brought by James E. Ball was sufficient to carry its burden of proceeding, *see* Direct Case at 29-30. Beehive described the Ball law suit and explained that Mr. Ball is seeking $120,000 in liquidated damages. *See id.* That was enough to trigger the presumption that the contract dispute arose in the ordinary course of Beehive's business. *See Litigation Costs*, 12 FCC Rcd at 5118. Moreover, Beehive has the benefit of the presumption that it incurred the legal expense in good faith. *See Mountain States I*, 939 F.2d at 1034. AT&T did not attempt to make the showing of "inefficiency or improvidence" necessary to rebut the presumption of Beehive's good faith. *Id.* (quoting *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 294 U.S. 63, 72 (1935)). As a result, there is no basis in this record for the Commission to substitute its judgment for Beehive's as to whether the legal expenses for the Ball case were reasonable and prudent. *See id. See also Litigation Expenses*, 92 FCC 2d at 144.

Beehive submits that its defense of the Ball suit is reasonably likely to benefit its ratepayers, including the IXCs. In the absence of a defense, Beehive would be subject to a $120,000 judgment. Payment of that judgment would be a recoverable expense. However, if Beehive prevails in the suit, or defeats the damages claim, and incurs less than $120,000 in legal expenses, there will be a net benefit to its ratepayers.

The "Bellcore" Litigation

AT&T understandably makes no real effort to contest the recovery of the expenses incurred by Beehive in the "Bellcore" litigation. *See* Opposition at 10. Beehive described that litigation in more than sufficient detail, *see* Direct Case at 17-20, especially since the Commission is a party to the litigation and has independent knowledge of most of the controversy.

Beehive showed how the litigation could benefit ratepayers. *See id.* at 19. And AT&T is just wrong in claiming that Beehive stated only that its new 800 service "would result in increased access revenues in the same manner that the JEI arrangement did". Opposition at 10. For example, Beehive demonstrated that success in the Bellcore litigation would allow it to provide "an innovative 800 service at low cost to its subscribers." Direct Case at 19.

The Wendover Case

AT&T reached its nadir in questioning the $12,000 expense Beehive incurred in its case against the Federal Aviation Administration and the City of Wendover for airport access. *See* Opposition at 10.

AT&T begins by carelessly mischaracterizing the record. Beehive did not assert either that it "maintains three aircraft" or that it is necessary for it to "maintain three aircraft". *Id.* at 10-11. Beehive represented that it had three aircraft in 1991, when the airport dispute began. Beehive only has two planes now.

AT&T tries to suggest that Beehive's "three aircraft" are not used "solely for company business or solely for the benefit of Bee-

hive's customers." Opposition at 11. [23/] To support that suggestion, AT&T "reproduced" without permission a copyrighted article written by Mr. Brothers for Americas Network magazine. *See id.* at 11 n.16, Attach. 2. All that AT&T's copyright infringement proves is that it did not read the article carefully.

Mr. Brothers' column in Americas Network magazine discloses that in 1997 he flew two other Beehive employees in a Cessna to Cody, Wyoming, where they attended the annual convention of Idaho, Utah and Wyoming LECs. *See id.*, Attach. 2 at 1-2. By traveling by air, the "three Beehive guys" avoided the massive traffic jams, and the 10-hour trips, that many "Utah attendees" experienced by driving to Cody. *Id.* Moreover, by using Beehive's Cessna, the trip took Mr. Brothers and his colleagues only four minutes longer than if they had flown by commercial airline. *See id.* Finally, the column shows that the convention was crowded with equipment salesmen, and that Mr. Brothers was "impressed with a nice little $4,500 spread spectrum on 960 MHz that takes 56K to provide five subscriber telephone lines by air." *Id.*

It appears that AT&T's "proof" defeated its claim. The Americas Network column not only shows that Beehive uses its Cessna for legitimate business purposes (to attend a LEC convention to examine new equipment), but it shows the savings in travel time (up to 20 hours for each conference attendee) that was gained by the use of the company plane. That savings increases efficiency, lowers

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[23/] Beehive notes that AT&T equates the conduct of "company business" with ratepayer "benefit".

costs, and ultimately benefits ratepayers.

AT&T should not be heard to question whether Beehive needs its own aircraft. In a recent telephone conversation with an AT&T employee at an airstrip near its Basking Ridge, New Jersey offices, Beehive was informed that AT&T maintains three company airplanes and a helicopter at that particular facility. Moreover, it appears that an AT&T subsidiary maintains a Dassault Brequet Falcon, N 222MC, at Boeing Field, near Seattle, Washington, which has been dubbed the "Billionaire Boys Club". *See infra* Exhibit 5. Therefore, Beehive seriously doubts that AT&T executives drive or fly commercial airlines to trade conventions.

General Ledger Entries

The Commission directed Beehive to "provide its unedited general ledgers for calendar years 1994, 1995 and 1996." *Designation Order* at 5. Beehive was not ordered to perform the extraordinary task of explaining all its ledger entries. Nevertheless, AT&T points to some "obscure expenses" in the ledgers and argues that, absent "further explanation", the expenses should be disallowed. *See* Opposition at 12-13. Because AT&T found so few entries to be questionable, Beehive will explain them (again, without conceding that further explanation is required). 24/

Brothers Leasing

In 1996, Beehive needed to replace some of its service vehicles. Farm Credit Leasing, which had leased equipment to Bee-

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24/ Beehive has already explained the alleged "anomalies" in the debit and credit entries for JEI. *See supra* p. 5.

hive in the past, considered the company to be a bad credit risk. Brothers Leasing was formed as a separate, family-owned leasing company to obtain the financing to acquire service vehicles for leasing to Beehive. All ledger entries showing "Beehive Leasing" are related to the leasing of vehicles. 25/

Medical Expenses And INS Payments

Under its employment agreement with Mr. Alexander Koshevoy, a foreign national, Beehive agreed to pay Mr. Koshevoy's medical expenses until he was covered by medical insurance. In addition, Beehive agreed to obtain a visa for Mr. Koshevoy, and therefore made payments to the Immigration and Naturalization Service. Such outlays are incurred in the ordinary course of employing highly competent foreign nationals. 26/

Francis Gaines Brothers

Francis Gaines Brothers was a full time employee of Beehive in 1994. The normal practice of Mr. and Mrs. Brothers was to receive the bulk of their compensation in payments at the end of each year. The payments of $34,896 to Mrs. Brothers in December 1994 were part

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25/ Beehive's lease arrangements with Brothers Leasing were reviewed by the UPSC as part of a nine-month audit of Beehive. The UPSC auditor did not recommend any changes in Beehive's accounting treatment of its lease expenses with Brothers Leasing.

26/ Mr. Koshevoy is responsible for all of Beehive's IXC billings. He calculated the refunds due under the *Refund Order*, and prepared Beehive's refund plan. *See Beehive Telephone Co., Inc. and Beehive Telephone, Inc. Nevada Refund Plan*, 13 FCC Rcd 764 (Com. Car. Bur. 1998). AT&T reviewed Mr. Koshevoy's calculations "in detail" and concluded that they were accurate. *See* AT&T's Comments on Beehive's Refund Plan at 1-2, *Beehive*, CC Docket No. 97-237 (Jan. 20, 1998).

of the $43,000 compensation she received that year.

When Mr. Brothers was away from the office, Mrs. Brothers administered Beehive's day-to-day operations. Because her duties included financial administration, office management, customer service (including dispatching service personnel), Mrs. Brothers' compensation was charged to buried cable, customer service, and administration.

Cowlitz River Software

In 1996, Beehive began a major upgrade of its billing system. Payments totalling $132,247 were made to Cowlitz River Software for the installation of the new billing software and for ongoing maintenance and support services necessary to adapt the software to Beehive's existing equipment.

Other Regulated Income

Beehive provided the Air Force with communications equipment to be used on the bombing range on the Dugway Army Base. After Beehive supplied the equipment, a balance of $19,200 remained on the contract. The Air Force contacted Beehive and asked if it would complete the contract by supplying the Air Force with cable. Beehive agreed and billed the Air Force $19,200. That amount was posted to account 5264.1 on November 25, 1996. *See infra* Exhibit 6. The cable was purchased by Beehive for $19,080, and that expense was posted to account 5264.1 on November 30, 1996. *See id.* The result was $120 in income for Beehive.

LDI SLU Factor

It was AT&T that erred when it "discovered errors in Beehive's

local switching calculations." Opposition at 13. In AT&T's view, Beehive "appeared" to have used exchange MOUs instead of total company MOUs in developing its annual traffic apportionment data. *See id.* However, Beehive used total company MOUs.

Attached hereto as Exhibit 7 are copies of the pages of Beehive's Direct Case that show how the percentages of interstate MOUs to total company MOUs ("LDI SLU factor") were calculated for Beehive Utah and Beehive Nevada for the years 1994, 1995 and 1996. 27/ As the Commission can see, each company's total MOUs for each year was calculated by multiplying "exchange calls" (line 2) by the "exchange/toll composite" (line 4). "Exchange calls" (or exchange messages) denotes the annual total of local and toll terminating calls in all exchanges. The "exchange/toll composite" is the composite holding time developed by using total local plus toll MOUs divided by total local and toll terminating calls for a seven-day period.

For example, Beehive Utah's total MOUs in 1996 was 43,289,198. That was computed by multiplying its total 1996 calls or messages (2,796,305) by its composite holding time (15.480857 MOUs). *See infra* Exhibit 3 at 1 (Direct Case p. 342). The fact that total company MOUs was used is confirmed by the fact that line 51 (the total subscriber line usage ("SLU")) was also 43,289,198. *See id.* at 2 (Direct Case p. 343). The LDI SLU factor of 0.738158 (line 52) was developed by dividing the interstate SLU MOUs of 31,954,282

27/ The pages have been Bates-stamped for ease of reference.

(line 47) by the total toll and local MOUs of 43,289,198 (line 51).

AT&T does not explain the methodology for its "recalculation" of the LDI SLU factor (line 52). *See* Opposition at Attach. 3. However, it appears that AT&T may have misinterpreted "exchange calls" (line 2) to mean exchange only calls used to develop MOUs on line 6. Thus, for example, AT&T recalculated Beehive Utah's 1996 LDI SLU factor to be 0.412910676 by treating the company's 43,289,198 total MOUs (line 6) as its total exchange MOUs. It then computed Beehive Utah's total SLU MOUs to be 77,387,880 MOUs by adding 43,289,198 "exchange" MOUs to the company's interstate (line 47), its intrastate interLATA (line 48), and its intrastate intra-LATA (line 49) SLU MOUs. It then divided the company's 31,954,282 interstate SLU MOUs (line 47) by its 77,387,880 total SLU MOUs and obtained a LDI SLU factor of 0.412910676.

Respectfully submitted,

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